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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re SALVADOR V., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B179730 (Super. Ct. No. 2004015241) (Ventura County)
THE PEOPLE, Plaintiff and Respondent, v. SALVADOR V., Defendant and Appellant.	

Salvador V. appeals an order of the juvenile court committing him to the California Youth Authority ("CYA") for a maximum term of 13 years and 6 months for battery committed on school property, misdemeanor battery, and assault with a deadly weapon, all criminal offenses found true in juvenile wardship petitions. (Welf. & Inst. Code, §§ 602 & 777; Pen. Code, §§ 243.2, subd. (a), 242, & 245, subd. (a)(1).)[1] We reverse the commitment order and remand to allow the court to exercise its discretion

[1] All further statutory references are to the Welfare and Institutions Code unless stated otherwise.

pursuant to section 731, subdivision (b), regarding a lesser term of confinement, but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

On November 18, 2002, Salvador V. punched another student at Fillmore Middle School. As the victim ran, he fell and suffered a head abrasion. The prosecutor filed a wardship petition against 14-year-old Salvador V., alleging that he committed the criminal offenses of battery committed on school property, and possession of marijuana at school. (Pen. Code, § 243.2, subd. (a); Health & Saf. Code, § 11357, subd. (e).) On February 21, 2003, Salvador V. admitted the battery allegation, and the drug offense was dismissed. The juvenile court declared Salvador V. a ward of the court, and placed him on probation with terms and conditions, including those relating to drugs and alcohol, possession of weapons, and criminal street gang membership.

Four months later, a probation officer filed a notice of probation violations, alleging that Salvador V. did not follow school rules, wore gang-style clothing ("Piru 13"), and used and possessed marijuana. Salvador V. admitted the probation violations. The juvenile court continued his wardship and probation, committed him to 45 days' confinement at the Clifton Tatum Center, and ordered that he serve the commitment by electronic monitoring at home.

On July 7, 2003, the probation officer filed a "probation memorandum" alleging that Salvador V. had used marijuana and cocaine. Salvador V. admitted the probation violations. The juvenile court continued his wardship and probation, and committed him to 150 days' confinement at Colston Youth Center. Pending an opening at that facility, however, the court ordered Salvador V. to remain in his home with electronic monitoring.

Within two weeks, the probation officer filed a subsequent notice of probation violations, alleging that Salvador V. had left his home on several occasions. Family members informed the probation officer that Salvador V. left the family residence to sell drugs. They requested his detention pending transfer to Colston Youth Center.

The juvenile court revoked Salvador V.'s home supervision, and ordered his detention at Clifton Tatum Center.

On September 5, 2003, Salvador V. became involved in an altercation with other wards at Colston Youth Center. Members of the Youth Center staff ordered Salvador V. and the others to cease fighting and sprayed them with pepper spray. Eventually, staff members restrained Salvador V. On September 9, 2003, the prosecutor filed a subsequent wardship petition against Salvador V., alleging that he committed misdemeanor battery. (Pen. Code, § 242.) Salvador V. admitted the allegation, and the juvenile court extended his Colston Youth Center commitment for 30 days.

On May 10, 2004, the probation officer filed yet another notice of probation violations, alleging in part that Salvador V. did not obey orders of his parents or the probation officer, failed to attend school or counseling, associated with gang members, and possessed graffiti markers. The probation officer noted that Salvador V. has gang-related tattoos, and his street gang moniker is "El Trooper." Salvador V. admitted the allegations and the juvenile court ordered his temporary detention.

On May 20, 2004, the prosecutor filed a new petition against Salvador V., alleging that committed assault with a deadly weapon, personally inflicted great bodily injury, and committed the crime for the benefit of a criminal street gang. (Pen. Code, §§ 245, subd. (a)(1), 12022, subd. (b)(1), 12022.7, & 186.22, subd. (b)(1).) The criminal offense concerned an assault against a minor whom Salvador V. believed to be a member of the "Little Boyz" street gang. Salvador V. either stabbed or struck the victim near his eye, causing a serious wound. Salvador V. admitted the allegations.

The probation officer prepared a disposition report for the juvenile court, recommending a commitment to CYA. The report noted that Salvador V. had committed violent crimes and that his family stated that he is a gang member and uses methamphetamine.

On September 13, 2004, the juvenile court committed the now 16-year-old ward to CYA. The juvenile court based its decision on the "exhaust[ion] of local

facilities," the violent nature of Salvador V.'s offenses, his violent behavior at the Colston Youth Center, and his "about zero" attitude toward rehabilitation.

The juvenile court fixed the maximum confinement as 13 years and 6 months, based in part upon the principal upper term of 13 years for assault with a deadly weapon, combined with the great bodily injury and street gang enhancements. (Pen. Code, §§ 245, subd. (a)(1), 12022.7, & 186.22, subd. (b)(1).) The court found the assault offense to be a felony.

Salvador V. appeals and contends that 1) the juvenile court abused its discretion by committing him to CYA, and 2) the juvenile court was unaware of its discretion to impose a lesser term of confinement. (§ 731, subd. (b).)

DISCUSSION

I.

Salvador V. argues that the juvenile court abused its discretion by committing him to CYA because insufficient evidence exists that he will benefit from the commitment, and the court did not consider alternative placement. (*In re Pedro M.* (2000) 81 Cal.App.4th 550, 555-556 [standard of review].) He points out that his mother proposed to send him to Sacramento to live with other family members in order to separate him from street gang membership. Salvador V. asserts that the juvenile court committed him to CYA as punishment for his "about zero" attitude.

Salvador V. also claims that a CYA commitment is inappropriate because it is an ineffective and destructive institution. He supports this contention by referring to a consent decree, investigative reports, and documents regarding institutional problems at CYA. Salvador V. adds that the commitment is inappropriate for him because of his youth and lack of sophistication.

The juvenile court possesses a broad discretion to decide whether to commit a minor to CYA. (§ 731; *In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.) We review the evidence and draw all reasonable inferences therefrom in favor of the juvenile court's decision. (*In re Angela M., supra*, 111 Cal.App.4th 1392, 1396.)

CYA commitment requires evidence of probable benefit to the minor and evidence that less restrictive placements are ineffective or inappropriate. (§ 734 [minor must benefit from "the reformatory educational discipline" provided by CYA]; *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.) No rule precludes CYA commitment unless less restrictive placements have been filed. (*In re Angela M., supra,* 111 Cal.App.4th 1392, 1396.) CYA commitment is justified when the current offense is serious and the ward has a history of criminal or delinquent behavior. (*In re Anthony M.* (1981) 116 Cal.App.3d 491, 502-503.)

The juvenile court did not abuse its discretion by committing Salvador V. to CYA because the evidence establishes that he would benefit from the commitment and that less restrictive alternatives are inappropriate. (*In re George M.* (1993) 14 Cal.App.4th 376, 379 [standard of review].) Salvador V. was involved in street gang activities, used drugs, and committed assaults upon others. The assault upon his last victim – with either a knife or a rock - resulted in a serious eye injury that required surgery. Over an 18-month probation period, Salvador V. committed violent acts and flouted the terms of his probation. He did not rehabilitate during probation or in local placements. The record also belies Salvador V.'s self-description as unsophisticated. Based upon his juvenile record, his poor performance on probation, his escalating violence, and his unwillingness to reform or comply with probation, the juvenile court reasonably concluded that Salvador V. would benefit from a CYA commitment.

Moreover, the juvenile court impliedly considered and rejected the less restrictive alternative of living with family members in Sacramento. (*In re Teofilio A., supra,* 210 Cal.App.3d 571, 577 [juvenile court need not state on the record its consideration and rejection of less restrictive placements].) The court also stated that the Clifton Tatum Center and Colston Youth Center had been ineffective, and that Salvador V. had fought with other wards at Colston Youth Center. The court concluded that CYA was the appropriate placement given Salvador V.'s violent behavior. It also impliedly rejected an out-of-state placement for that reason.

We reject Salvador V.'s contention, based upon a consent decree in another case and documents outside the record, that CYA has institutional problems. By separate order, we have denied his request for judicial notice of the consent decree and other documents. Salvador V. did not offer the documents into evidence during the juvenile court proceedings, and the consent decree occurred after the dispositional order here. (*In re Marriage of Folb* (1975) 53 Cal.App.3d 862, 877, disapproved on other grounds in *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 749, fn. 5.) Moreover, they do not support his contention. To the contrary, the documents indicate that CYA acknowledges its institutional shortcomings and is pursuing corrective action. Salvador V. does not present evidence regarding any deficiencies in the contemplated corrections that would preclude his rehabilitation.

II.

Salvador V. argues that the juvenile court was unaware of the discretion conferred under an amendment to section 731, subdivision (b), to impose a lesser term of confinement. That section now provides: "A minor committed to the Department of the Youth Authority may not be held in physical confinement for a period of time in excess of the maximum period of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court. *A minor committed to the Department of the Youth Authority also may not be held in physical confinement for a period of time in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section. This* section *does not limit* the power of the *Youth Authority* Board to retain the minor on parole status for the period permitted by Section 1769." (2003 amendment, operative January 1, 2004, in italics.)

The recent amendment to section 731 grants the juvenile court the discretion to impose a lesser term of confinement than the upper term, where the factual circumstances so warrant. (*In re Jacob J.* (2005) 130 Cal.App.4th 429, 437; *In re Carlos*

E. (2005) 127 Cal.App.4th 1529, 1543.) "[S]ection 731 unmistakably requires the trial court to set a maximum term of physical confinement in CYA based upon the facts and circumstances of the matter." (*In re Carlos E.*, at p. 1543.)

We agree with Salvador V. that the juvenile court was not aware of its discretion under section 731. Although the minor's attorney stated that the court had "considerable discretion as to what the sentence would [be]," the prosecutor replied that the court had no discretion "to fashion the sentence any differently than what the max time is." There was no further argument or discussion of the matter.

The error deprived Salvador V. of his constitutional right to a fair hearing and due process. (*In re Sean W.* (2005) 127 Cal.App.4th 1177, 1181-1182.) Failure to exercise a discretion conferred and compelled by law constitutes a denial of due process and a fair hearing. (*Id.*, at p. 1182.) The error requires reversal. (*Ibid.*)

We remand to the juvenile court with directions to exercise its discretion in setting Salvador V.'s maximum term of confinement, pursuant to Welfare and Institutions Code section 731, subdivision (b). The order is otherwise affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

John Dobroth, Judge

Superior Court County of Ventura

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